



March 2, 2020

EMPLOYER GUIDANCE – CORONAVIRUS 2019

Perhaps nothing is more contagious in this world than fear, misinformation, and uncertainty. So it is with the virus identified as “SARS-CoV-2”¹ and the resulting disease named “coronavirus disease 2019,” abbreviated as “COVID-19.” According to World Health Organization Director-General Tedros Adhanom Ghebreyesus, “our greatest enemy right now is not the virus itself. It’s fear, rumors and stigma.”²

According to the most recent figures from the U.S. Centers for Disease Control and Prevention (“CDC”), as of March 2, 2020 there are 16 confirmed and 27 presumptive positive COVID-19 cases in the United States out of 459 individuals tested, including four confirmed and 22 presumptive positive cases arising from person-to-person spread, i.e., community spread.³ Of those positive confirmations, 12 involve individuals who recently traveled to areas with known localized outbreaks and three involve person-to-person transmission. Additionally, there are presently 48 known cases involving individuals repatriated to the United States: 45 from the Diamond Princess cruise ship and three from Wuhan, China.⁴ Internationally, the WHO reports the most significant concentration of the virus is in Hubei Province, China, with 66,907 confirmed cases and 2,873 deaths as of March 1, 2020. Outside of China, the WHO reports 7,169 confirmed cases including 705 from the Diamond Princess, resulting in 104 death, primarily occurring in four countries— Republic of Korea (18), Italy (29), Japan (5) and Iran (43).⁵ By comparison, the CDC estimates that in the United States alone, from October 1, 2019 through February 15, 2020, there have been 29 to 41 million confirmed cases of seasonal influenza illness resulting in an estimated 16,000 to 41,000 deaths.⁶ And while the mortality rate from COVID-19 in comparison to seasonal flu is, at first glance, alarming, the WHO reports serious illness appears to develop primarily in older persons and persons with pre-existing medical conditions such as high blood pressure, heart disease, and diabetes.⁷ Further, according to a recent study in the New England Journal of Medicine, current mortality rate for COVID-19 is significantly lower than mortality rates associated with previous outbreaks – SARS (2002 – 9.5%), SARS (2012 – 34.4%).

Though COVID-19 may never reach pandemic levels and may never approach seasonal flu illness and mortality numbers, it has nevertheless significantly impacted global and domestic markets, international travel and supply chains, and has understandably generated fear and anxiety in the workplace. Proactively addressing COVID-19 and responding in the event of an outbreak requires planning and implementation based on the best available scientific and medical recommendations while ensuring full compliance with applicable laws, particularly employment laws.

EMPLOYER BEST PRACTICE RECOMMENDATIONS

Communicate and Educate. Regardless the size of an employer or the number of offices, work locations, or jobsites, communication and education is critical to minimize employee concerns and workplace disruptions. At this stage,

¹ Severe acute respiratory syndrome coronavirus 2.

² <https://www.cnbc.com/2020/02/28/who-raises-risk-assessment-of-coronavirus-to-very-high-at-global-level.html>

³ <https://www.cdc.gov/coronavirus/2019-ncov/cases-in-us.html>

⁴ *Id.*

⁵ https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200227-sitrep-38-covid-19.pdf?sfvrsn=9f98940c_2

⁶ <https://www.cdc.gov/flu/about/burden/preliminary-in-season-estimates.htm>

⁷ <https://www.who.int/news-room/q-a-detail/q-a-coronaviruses>

employees must know that company management is monitoring a virus outbreak and will act with the employees' best interests in mind. Communications should be brief and fact-based from reputable sources. A good starting point is the CDC website, which, among other informational items, provides posters presently available in English, Spanish, and Simplified Chinese with information concerning COVID-19, its symptoms, how it is spread, and prevention tips, among other helpful information.⁸ Employers with vision-impaired employees and/or employees not fluent in the available poster languages must communicate the same information to those employees or run the risk of claims of discrimination or failure to accommodate under the ADA, Title VII, or other applicable employment laws.⁹ Most managers and/or executives are not medical professionals or infectious disease experts and should not pretend to be such. Rely on the experts, coordinate education efforts with federal, local, and state health departments.

Encourage Prevention Through Hygiene and Sanitation. The CDC's knowledge about how COVID-19 is spread is based on what is presently known about similar coronaviruses. The virus is thought to spread primarily from person-to-person between people in close contact with one another and respiratory droplets produced when a person coughs, or sneezes. It is possible, though not specifically known, that a person can contract COVID-19 through contact with a surface or object that has the virus then touch his or her mouth, nose, or possibly eyes.¹⁰ To prevent the spread of the virus through known and likely means, employers should place posters provided by the CDC and/or other agencies or health departments encouraging proper hand hygiene and coughing and sneezing etiquette at locations in the workplace where they are likely to be seen.¹¹ As with any communication to employees, employers must take steps to ensure the message is effectively conveyed to disabled or non-English speaking employees. In addition, employers should also consider providing alcohol-based sanitizers and/or wipes, tissues, and no-touch trash receptacles for use by employees throughout the workplace, including locations where groups of employees are likely to gather (i.e., conference rooms, break rooms, etc.). Employers should routinely clean all frequently touched surfaces and objects in the workplace, including workstations, countertops, and doorknobs. At this time, the CDC does not recommend using any specialized cleaning agents; employers should utilize cleaning agents commonly used for such purpose. Employers must, however, be mindful to ensure all cleaning and/or sanitation measures are accessible to and by employees with disabilities. For example, steps must be taken to ensure hand sanitizer is located within the prescribed reach range for employees in wheelchairs and must provide alternative sanitizer for employees who, because of a disability, have an intolerance to alcohol-based products.

Consider Modification of Sick Leave and Leave of Absence Policies. Employers should actively encourage employees with possible COVID-19 symptoms, or those who have been in contact with persons with such symptoms, to stay home. The CDC suggests employers consider relaxing sick leave and/or leave of absence policy requirements for a medical provider's note following absences because "healthcare provider offices and medical facilities may be extremely busy and not able to provide such documentation in a timely way."¹² This recommendation, however, implicates both the FMLA and the business justification behind medical certification requirements. Employees are entitled to FMLA protections whenever absent from work for a serious health condition, which, among other conditions, includes any illness resulting in a period of incapacity for three or more consecutive full calendar days that involves continuing treatment by a health care provider. Thus, a person with COVID-19 symptoms who visits a doctor for his or her condition and who is either prescribed medication or directed to remain away from work for a period of three or more days will likely qualify as an individual with a serious health condition under the FMLA. Most FMLA-covered employers require that employees returning to work from an FMLA-qualifying absence submit a fitness-for-duty certification. Fitness-for-duty certification is permitted, but not mandated, by the FMLA. Ultimately, what action employers take in response to the CDC's recommendations requires the exercise of discretion influenced by the circumstances. For example, in a workplace inundated with employees exhibiting symptoms of acute respiratory illness, especially where such illness is widespread in the subject community, it may make practical and logistical sense to suspend the relevant aspects of the employer's sick leave, leave of absence, or FMLA policies. Absent a localized, widespread outbreak, such actions are likely unnecessary and could potentially invite abuse by employees simply wanting time off from work. If, however, modifications to applicable policies are made, those modifications

⁸ <https://www.cdc.gov/coronavirus/2019-ncov/communication/factsheets.html>

⁹ The CDC provides videos containing much of the same information as the posters, which can be a valuable resource for vision-impaired employees. <https://www.cdc.gov/coronavirus/2019-ncov/communication/videos.html>

¹⁰ <https://www.cdc.gov/coronavirus/2019-ncov/about/transmission.html>

¹¹ <https://www.cdc.gov/handwashing/posters.html> (CDC)

¹² <https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/guidance-business-response.html>

must be applied uniformly to all impacted employees without regard to race, gender, ethnicity, or any other protected classification under federal, state, or local law.¹³

Evaluate Alternative Work Arrangements. Though neither CDC nor any known local health departments have yet recommended social distancing as a means of preventing spread of COVID-19, employers should evaluate what steps can be taken in the event of such recommendation to increase the physical distance among employees and between employees and others. The most obvious strategies for social distancing are: (1) working from home and (2) staggered shifts. Both, however, come with practical, logistical, and legal hurdles.¹⁴

- 1) Working from Home/Telecommuting: Employers should evaluate which members of their workforce can effectively fulfill his or her job functions working remotely. In addition to these practical considerations, employers must be mindful of additional risks inherent with telecommuting. For instance, if the employee is a non-exempt hourly employee under the FLSA, procedures must be implemented for the employee to account for or record his or her working hours and meal and rest periods mandated by state law or a collective bargaining agreement? Under the FLSA, non-exempt employees must be paid for all time spent working. Exempt employees must be paid their full salary for any workweek in which the employee performs more than a *de minimis* amount of work. If the employee works from home because of an illness and is not working full time, the FMLA's reduced schedule and/or intermittent leave provisions may be applicable. Telecommuting also invites potential ADA issues. For example, if a vision-impaired employee was provided a special monitor at the workplace or a hearing-impaired employee utilized a TTY phone in the workplace, such accommodations (or other reasonable accommodations that would enable the employee to perform the essential functions of his or her job) must be made available while telecommuting. Working from home also invites concerns regarding state law compliance. For instance, employers must evaluate any obligation imposed by state law to reimburse or compensate an employee for his or her mandated business use of a personal cell phone or wifi network while telecommuting. Working from home also begs the question of how an employer can enforce various company policies, such as its technology/computer usage policies. Telecommuting also raises data security concerns and requires employers to know whether the employee will be able to securely access company networks and data, whether the employee's personal devices have up-to-date virus and malware protection, or whether the employee's personal network is sufficiently protected from attack. These are but a few of the many issues telecommuting presents for employers, all of which should be thoroughly addressed before implementing a work-from-home strategy to minimize exposure to COVID-19 or any other infectious disease.
- 2) Staggered Shifts: Where available, staggered shifts present an opportunity for employers to distance employees who would otherwise be working near one another. The first and most obvious question an employer considering staggered shifts must answer is whether operations and/or production can be maintained with fewer employees working at a given time. In unionized facilities, an employer must consider limitations imposed by a collective bargaining agreement and whether staggered shifts, or any strategy implemented to address COVID-19, represents a unilateral change in work conditions, mindful of the risk that changes imposed without bargaining unit input could result in an unfair labor practices claim under the NLRA.

Adjust Business Travel As Necessary. The U.S. government has placed a moratorium on foreign nationals who have visited China within the past 14 days from entering the country. American citizens, lawful permanent residents, and their families who have visited China within the past 14 days will be allowed into the country, but will be redirected to one of 11 designated airports to undergo health screening and, depending on their health and travel history, may be subject to some limitations on their movement for 14 days from the time they left China.¹⁵ Similarly, the U.S. Department of State has issued travel advisories ranging from Level 4: Do Not Travel to Level 2: Exercise Increased

¹³ Other policy modifications may include permitting leave to seasonal or probational employees who may not otherwise be entitled to paid or unpaid (non-FMLA) leave, permitting use of paid vacation leave for unpaid sick leave when policies otherwise would prohibit such use, or permitting the use of sick leave without a doctor's visit where policy would otherwise require it. The goal of such modifications would be to prevent a potentially infected employee from infecting others in the workforce.

¹⁴ When feasible, employers should also consider video or telephone conferencing as an alternative to in-person meetings.

¹⁵ <https://www.cdc.gov/coronavirus/2019-ncov/travelers/from-china.html>

Caution for countries experience concentrated outbreaks of COVID-19.¹⁶ As a result, employers are encouraged to cancel or postpone non-essential business travel to and from areas where COVID-19 has been confirmed. For many businesses, however, such travel to impacted countries is essential and necessary to sustain operations. In such instances, employers should ensure employees review and understand current CDC travel guidance,¹⁷ ensure employees have necessary contact information to secure medical care in a foreign country including contact information for the local U.S. consulate office which can help locate healthcare services, and should consider providing employees additional protections such as personal protective equipment. To the extent an employer adjusts its travel policies to avoid travel to countries presenting a greater risk of infection, it must administer that policy in a non-discriminatory manner. For instance, prohibiting employees in certain protected classes (i.e., pregnant, disabled, those recently returning from FMLA leave) from traveling to high-risk countries while requiring other employees to continue such travel could lead to claims of discrimination or retaliation under applicable federal or state employment laws. On the other hand, employees in those classifications may be entitled under the ADA, Pregnancy Discrimination Act, or state law, to a reasonable accommodation that would require excusing them from certain high-risk travel. Employees returning from overseas travel to countries with restrictions will be subjected to government screening and, if mandated, isolation and/or quarantine. In such instances, employers should consult with counsel to discuss proper application of leave policies in accordance with applicable law and to ensure compliance with state and federal wage and hour laws.

Ensure a Safe Workplace In Compliance With Applicable Workplace Safety Laws. Section 5(a)(1) of the Occupational Safety and Health (OSH) Act, 29 U.S.C. § 654(a)(1), generally known as the General Duty Clause, requires employers to provide every employee “employment and a place of employment, which are free from recognized hazards that are causing or are likely to cause death and serious physical harm.” Neither OSHA nor any of the 28 OSHA-approved state plans offer guidance or regulations specific to COVID-19 or other infectious disease, with one exception. The California Division of Occupational Safety and Health (Cal/OSHA) Aerosol Transmissible Diseases standard (Title 8 CCR; Section 5199),¹⁸ which is only mandatory for certain healthcare employees in the state, provides useful guidance aimed at preventing employee illness from infectious diseases that can be transmitted by inhaling air. Similarly, OSHA’s Personal Protective Equipment (PPE) standards (29 CFR 1910, Subpart 1), which require the use of gloves, eye and face protection, and respiratory protection in certain industries may also prove useful in developing strategies to combat the spread of COVID-19. In the event an employer requires the use of PPE, it must be mindful of the possible need to provide accommodations for employees with disabilities (i.e., latex allergy) or firmly held religious convictions requiring religious garb or grooming requirements that are incompatible with certain PPE.

ADA Answers to Frequently Asked Questions. When employers begin pandemic planning, questions frequently arise regarding what information employers can require from employees and what employers can do with that information. The ADA prohibits employers from making “disability-related inquiries,” which is any inquiry that is likely to elicit information about a disability. Thus, employers may not ask employees if they suffer from any of the conditions identified by the CDC that would place them at high-risk from COVID-19. Employers may, however, survey employees to elicit information to plan for absenteeism in a manner that does not violate the ADA. Specifically, employers may ask employees, *without identifying the specific factor that applies to them*, whether in the event of a COVID-19 outbreak they would: (1) need to care for a child if day-care centers or schools were closed; (2) need to care for dependents if other services were unavailable; (3) be unable to travel to work in the event public transportation was unavailable; or (4) whether the employee or the employee’s family falls into a category identified by the CDC as high-risk for COVID-19.¹⁹ Similarly, the ADA does not prohibit employers from requiring employees displaying COVID-19-like symptoms to go home because a transitory illness likely does not qualify as an ADA-qualifying impairment and, if the symptoms were severe enough to constitute a disability, the action would be permitted under the ADA’s “direct threat” provisions. Employers are also permitted to ask employees who call in sick if they are experiencing COVID-19 symptoms, i.e., fever, coughing, shortness of breath, etc. Such information, however, must be maintained in confidence and kept in a confidential medical file separate and apart from the employee’s personnel records. The ADA, HIPAA, and the FMLA, as well as various state laws, impose strict

¹⁶ <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories.html/>

¹⁷ <https://www.cdc.gov/coronavirus/2019-ncov/travelers/index.html>

¹⁸ <https://www.dir.ca.gov/title8/5199.html>

¹⁹ https://www.eeoc.gov/facts/pandemic_flu.html

confidentiality requirements pertaining to employee health information. Thus, in the event an employee has a confirmed test for COVID-19, employers may not disclose any identifying information to the workforce but would be wise to inform the workforce that there has been a confirmed case at the employee's location, provide risk assessment protocol from the CDC,²⁰ reiterate prevention protocol, and implement any other preventative measures necessary to prevent further spread.

Additional Considerations. Employers should consult guidance issued by the CDC, OSHA, local health departments, and other governmental agencies regularly because understanding of COVID-19 and the proper response to an outbreak are rapidly changing. Employers should also review all existing disaster response plans and/or continuity of operations plans to identify any gaps in the plans with respect to pandemic responsiveness. If an employer does not presently have a continuity of operations plan or disaster response plan in place, it should begin developing one now. An effective continuity of operations plan will address what is necessary to keep business functioning; the roles of essential employees and key contacts; a chain of command company-wide and at each business location in the event of a pandemic or other disaster; employee cross-training needs to ensure efficient operations in the event of a reduced workforce; infrastructure needed to support telecommuting; essential local, state, and federal resources; a means of contacting employees to activate and deploy the plan; vendor, supply chain, and client/customer contracts and obligations and the impact, if any, a pandemic or other disaster will have on those relationships and obligations; alternative suppliers; prioritizing customers; and, among many other factors, the business and legal impact of temporarily suspending some or all operations.

Every employer is different and there is no one-size-fits-all solution to a potential COVID-19 pandemic. What is reasonable and effective for a small business in middle America will not be reasonable or effective for a large employer with multiple domestic and foreign locations. An appropriate response to the threat of a COVID-19 outbreak must be determined on a case-by-case basis considering a variety of factors in reliance on guidance from the experts – CDC, WHO, local health departments, and legal counsel.

Additional Information

If you have any questions regarding this Client Alert, please contact your Kutak Rock attorney or one of the authors listed below. For more information regarding our practices, please visit us at www.KutakRock.com.

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²⁰ <https://www.cdc.gov/coronavirus/2019-ncov/php/risk-assessment.html>